In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 297

J. A. TOBIN CONSTRUCTION COMPANY; ODESSA KREBS; EDMOND H. KREBS, JR., LORENA LANE, NEE KREBS; NAWATHA REDDING, NEE KREBS; JAQUITAH BAILEY, NEE KREBS; and JOSEPH E. KREBS, Individually; and JOSEPH E. KREBS, as Executor of the Estate of Edmond H. Krebs, Deceased, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

As early as 1949, the United States' plans for the Eufaula Dam and Reservoir Project on the Canadian River in Oklahoma called for relocation of highway 9-A (Pet. App. A6). In January 1961, the govern-

ment advertised for bids for construction of the relocated highway (*ibid.*), and, in the same month, petitioner Tobin [1] began seeking a suitable location for a rock quarry for use in that construction (Pet. App. A4). Petitioner's bid was accepted and it was awarded the contract on February 15, 1961 (Pet. App. A6). Despite the fact that the center line and other important points of the projected highway were staked and flagged [2] in October 1960 (Pet. App. A6-A7) and the blueprints supplied to petitioner for the bidding showed the new highway's exact location (Pet. App. A7), petitioner selected and leased [3] a site for its quarry "almost in the middle of an area" designated, by the stakes and on the blueprint, for an interchange between the relocated highway and another road (Pet. App. A2).

Petitioner began clearing the overburden late in April 1961 (Pet. App. A6, A8). At that time as well as later, government representatives personally advised petitioner that its quarry was on land proposed to be taken for the new highway (Pet. App. A8). The government was particularly worried

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[1] Hereafter "petitioner" will be used to refer only to Tobin Construction Company. Any rights of the other petitioners are derivative from Tobin's.

[2] The court below adopted the commission's findings that "substantial stakes were driven at intervals of 100 feet and flagged so the stakes could easily be seen by anyone walking out the line of the right-of-way" (Pet. App. A22, A6-7).

[3] No rental was charged; instead the lease provided for a per-cubic-yard royalty for the material removed (Pet. App. A22).

lest the excavation leave a hole in the right-of-way, not shown on the blueprints upon which the bids were based, which would have to be filled at government expense (Pet. App. A9). After shutting down briefly in April, petitioner continued its operations until the district court ordered it to stop (Pet. App. A8-A10). This condemnation proceeding was filed on September 20, 1961 (Pet. App. A9). Subsequently, petitioner developed a new quarry elsewhere (Pet. App. A10-A11).

In the valuation proceeding, the condemnation commission appointed pursuant to Fed. R. Civ. P. 71A(h) found that the site leased by petitioner was not, as it claimed, a well established commercial quarry and that there was no market for a commercial quarry in the vicinity, apart from the needs of the government for the Eufaula Project. Hence, the commission found that petitioner's interest had no fair market value.[4] It further held that the loss sustained by petitioner in having to readjust its quarry operations was noncompensable consequential damage. Its view was that "Tobin took a calculated risk that it would be able to quarry the rock and complete its contract before the land was taken and * * * it lost" (Pet. App. A25, A16). The district court and the court of appeals affirmed, finding substantial support in the facts and in law for the commission's decision (Pet. App. A19-A25).

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[4] Only the value of the quarry, as such, is in issue here. No complaint is made of the valuation of the land on which the quarry rested.

Further review of this case is not warranted. The fair market value of petitioner's quarry is a question of fact, which was carefully considered below. There is no reason to set aside the concurrent findings of the commission and two courts. *United States* v. *Dickinson*, 331 U.S. 745, 751; *Comstock* v. *Group of Investors*, 335 U.S. 211, 230. The only value in petitioner's quarry arose from the government's special demand for rocks for use in building the highway in whose right-of-way the quarry was dug. "Just compensation" does not require inclusion of such value. In *United States* v. *Miller*, 317 U.S. 369, this Court held that where, as here, the property taken was clearly within the government's project and took on enhanced value from the needs of that project, no account need be taken of that enhancement. This principle was expanded in *United States* v. *Cors*, 337 U.S. 325, where this Court discounted the enhanced value of a vessel, whose taking was not previously contemplated, arising from the demand created by the government's earlier takings of numerous other vessels. Petitioner's contention that the government is compelled, in taking property for a highway, to pay for a quarry dug only because of the construction of that highway, and at a site known to be along its projected route, is untenable. Its acceptance would undermine settled authority, such as the cases cited above, and would foster speculation at public expense.

Nor is petitioner entitled to recover the increased cost of completing the contract with rock from another quarry. "Since 'market value' does not fluctuate with the needs of condemnor or condemnee

but with general demand for the property, evidence of loss of profits, damage to good will, the expense of relocation and other such consequential losses are refused in federal condemnation proceedings." *United States* v. *Petty Motor Co.*, 327 U.S. 372, 377-378; *Mitchell* v. *United States*, 267 U.S. 341, 344-346; *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 282-283, 285. In any event, petitioner was fully aware, when it acquired the quarry, that it would be taken for the highway and could have foreseen that this taking would necessitate locating another quarry. It should not now be permitted to shift to the public the relocation cost resulting from its "calculated risk."

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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